Supreme Court, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

October Term, 1995

MARY CATHERINE BORELLI McNEIL; et al.,

Petitioners,

v.

OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a public body corporate; et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

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32 pp

QUESTIONS PRESENTED

I. Whether the denial of a predeprivation hearing and loss of possession of Petitioners' land for two years (and continuing) during a local governmental eminent domain proceeding is a violation of due process under the Fourteenth Amendment?

II. Whether denial of a predeprivation hearing and destruction of private property as directed by local governmental officials during an eminent domain proceeding creates absolute immunity for said public officials and their private contractor under 42 U.S.C. § 1983?

III. Whether the denial of *both* the Petitioners' (a) use of their land and (b) the "award" deposited into court, for over two years (and continuing) creates a procedural violation of due process under the Fourteenth Amendment?

IV. Whether dismissal of a cause of action pursuant to 42 U.S.C. § 1983 against governmental officials (and contractor) that directed and performed destruction of property before the predeprivation hearing occurred in an eminent domain case is a violation of procedural due process when the Court directed the property owner's only relief is within the pending condemnation case in which said public officials (and contractor) are not parties?

PARTIES

The participants in the proceedings below were:

Mary Catherine Borelli McNeil; Mary Catherine Borelli McNeil, as mother, next friend, guardian and custodian for minors Jenifer Nicole McNeil and Sarah Faith McNeil; John W. Borelli, Jr.; John W. Borelli, Jr., as father, next friend, guardian and custodian for minors Stephen Thomas Borelli, Eleanor Mary Borelli and Marguerite Claire Borelli; Margaret Anna Borelli Fent; Elizabeth Ann Fent; David Jerome Fent and Margaret Mary Fent, Plaintiffs,

v.

Oklahoma City Urban Renewal Authority, a public body corporate; and Stanton L. Young, K. E. Smith and Wiley Rice, individually and in their official capacity as Directors of the Oklahoma City Urban Renewal Authority; and Midwest Wrecking Co., a corporation, Defendants.

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No. _____

In The

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October Term, 1995

MARY CATHERINE BORELLI McNEIL; et al.,

Petitioners,

v.

OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a public body corporate; et al.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully pray that a writ of certiorari be issued to review the decision of April 19, 1995, of the Supreme Court of Oklahoma and the Court of Appeals of the State of Oklahoma, Division No. 2, opinion.

OPINIONS BELOW

The Order denying Petitioners' Petition for Writ of Certiorari filed in the Supreme Court of the State of Oklahoma and directed to the Court of Appeals of the State of Oklahoma, Division No. 2, is reprinted in the

Appendix to this Petition at A1. The opinion of the Court of Appeals of the State of Oklahoma, Division No. 2, is reprinted in the Appendix to this Petition at B1-B4. The opinion of the District Court of Oklahoma County, State of Oklahoma, is reprinted in the Appendix to this Petition at C1-C2.

JURISDICTION

The Order of the Supreme Court of the State of Oklahoma denying Writ of Certiorari was rendered on April 19, 1995 and filed April 20, 1995. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1257 and Rule 13.1 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fourteenth Amendment to the Constitution of the United States provides:

> **Amendment XIV.**
>
> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within

its jurisdiction the equal protection of the laws.

2. 42 U.S.C § 1983 provides:

> § 1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be statute of the District of Columbia.

3. Okla. Stat. tit. 66, § 53(C) (West 1991) provides:

> § 53. Taking by eminent domain – Commissioners – Appointment and proceedings – Right to construct road
>
> (C) The commissioners shall be sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which said owner may sustain by reason of the condemnation and they shall assess the just compensation to which said owner is entitled; and they shall forthwith make report in writing to the clerk of the court, setting forth the quantity, boundaries, and just compensation for the

property taken, and amount of injury done to the property, either directly or indirectly, which they assess to the owner; which report must be filed and recorded by the clerk. A certified copy of the report may be transmitted to the county clerk of the county where the land lies, to be by him filed and recorded, without further acknowledgment or proof, in the manner and with like force and effect as is provided for the recording of deeds. And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises.

4. Okla. Stat. tit. 66, § 55(A) (West 1991) provides:

§ 55. Review of commissioner's report – Jury trial – Notice – Costs

(A) The report of the commissioners may be reviewed by the district court, on written exceptions filed by either party, in the clerk's office within thirty (30) days after the filing of such report; and the court shall make such order therein as right and justice may require, either by confirmation, rejection or by ordering a new appraisement on good cause shown; or either party may within sixty (60) days after the filing of such report file with the clerk a written demand for a trial by jury, in which case the amount of damages shall be assessed by a jury, and the trial shall be conducted and judgment

entered in the same manner as civil actions in the district court. If the party demanding such trial does not recover a verdict more favorable to him than the assessment of the commissioners, all costs in the district court may be taxed against him.

STATEMENT OF THE CASE

A. Factual Background (eminent domain proceeding)

Eminent domain authority in Oklahoma comes from Article 2, Section 24, Constitution of Oklahoma. The Respondent, OKLAHOMA CITY URBAN RENEWAL AUTHORITY (hereinafter referred to as "OCURA") received its condemnation powers from Okla. Stat. tit. 11, § 38-111 (West 1991) and § 38-111(B) provides that urban renewal authorities will use the condemnation procedure prescribed for railroad companies found in Okla. Stat. tit. 66, § 51 et seq. (West 1991).

On January 23, 1990, OCURA filed its petition for condemnation naming Petitioners as Defendants with respect to real property Petitioners owned and operated as a parking lot business.

The condemnation case was filed in the District Court of Oklahoma County, Oklahoma, Case No. CJ-90-624. Pursuant to a notice being served upon the Petitioners. A hearing was held for the purpose of appointing three commissioners (appraisers) to determine the market value of the fee title in the land being taken.

On May 14, 1990, the "Report of Commissioners" with an award of $74,000.00 was filed in the condemnation action and on the same day OCURA deposited the amount of the award into the court clerk's office.

On May 29, 1990, the Petitioners filed "exceptions" to the "Report of Commissioners" objecting to the taking on various grounds of public need and necessity as per authority under Okla. Stat. tit. 66, § 55(A). Also, a demand for jury trial to hear the question of the amount of damages (market value) was filed pursuant to this same § 55(A).

Thereafter, OCURA employees posted notices on cars parked on Petitioners' property stating a change in the ownership and to vacate the premises.

The filing of "exceptions or objections" to the taking gives Respondents notice that Petitioners intend to continue use of their private property until a court determines whether a public need and necessity exists before possession is granted. OCURA officials completely ignored this filing. OCURA as plaintiff in an eminent domain proceeding is the moving party and has the burden to satisfy all constitutional and statutory requirements before possession is allowed. Oklahoma is not a "quick take" state in eminent domain proceedings.

On September 19, 1990, the Respondents, STANTON L. YOUNG, K. E. SMITH and WILEY RICE (hereinafter referred to as "YOUNG", "SMITH" and "RICE") as directors of OCURA approved a demolition and clearance contract with Respondent, MIDWEST WRECKING CO. (hereinafter referred to as "MIDWEST") for Petitioners' parking lots.

From October 1 through 15, 1990, MIDWEST destroyed and removed the parking lot surface. Thereafter, OCURA employees installed a "pole and cable" type fence to secure the land from further use. To this date the private property is in possession of OCURA.

State and federal courts have held that if the Petitioners withdraw their award from the court clerk's office, Petitioners will waive their "exceptions or objections" to the taking. One cannot have their cake and eat it at the same time! Therefore, Petitioners are in an equal protection and due process "Catch 22" procedural situation. Petitioners have been denied the use and possession of their private property (and its business) by an illegal early entry *and* denied the use and possession of the deposited award during the same illegal early entry.

On October 17, 1990, (two days after destruction of parking lots) the Petitioners sought an injunction in the pending eminent domain case prohibiting destruction of the parking lots. The trial court denied the injunction request on an agreed order since all the property was destroyed. An appeal from this injunction order was affirmed by the Court of Appeals for the State of Oklahoma, Division No. 1 on August 25, 1992, and published as *Oklahoma City Urban Renewal Auth. v. Borelli*, 848 P.2d 33 (Okl. App. 1992).

On February 9, 1993, the Supreme Court of the State of Oklahoma denied a Writ of Certiorari to review this Court of Appeals opinion on the injunction issue by a five to four vote.

No action has occurred in the eminent domain case since the denial of a Writ of Certiorari as to the injunction

issue. The Petitioners' property remains in possession of OCURA and the award remains in the District Court Clerk's Office.

B. Proceedings Below (civil rights action)

On September 21, 1992, (before the running of two years from destruction of the parking lots), Petitioners' filed an action in the District Court of Oklahoma County, Oklahoma, Case No. CJ-92-7943 alleging trespass, constitutional and civil rights counts against all the Respondents as caused by the denial of a predeprivation hearing on the Petitioners' filed "exceptions" and destruction of parking lots.

The filing of an action on September 21, 1992, in Case No. CJ-92-7943 for trespass, constitutional and civil rights violations is how the federal questions were first raised under U.S. Supreme Court Rule 14(h).

On August 17, 1993, the trial court sustained the Respondents' motion to dismiss the counts in trespass, constitutional and civil rights without prejudice to Petitioners' right to pursue their remedies in the pending condemnation action, CJ-90-624-64.

This creates a procedural problem! The Respondents, YOUNG, SMITH, RICE and MIDWEST are *not* parties in the pending eminent domain proceeding. The Court's action was to dismiss the case, *not* consolidate the cases. Therefore, Respondents YOUNG, SMITH, RICE and MIDWEST are no longer in any action and have been granted absolute immunity for their acts.

An appeal was filed by Petitioners. The Court of Appeals, Division 2, State of Oklahoma, filed a memorandum opinion (dated December 27, 1994) affirming the trial court's dismissal.

On April 20, 1995, the Supreme Court of the State of Oklahoma denied a Writ of Certiorari to review the Court of Appeal's opinion by an eight to one vote.

REASONS FOR GRANTING THE WRIT

This case is civil rights verses eminent domain. This is a case of first impression. Does the mere fact the civil rights violations occur during an eminent domain proceeding give public officials (and their contractors) absolute immunity?

Civil rights and constitutional violations can occur before, during or after a criminal proceeding. Can civil rights or constitutional violations occur before, during or after other type proceedings such as eminent domain?

This Oklahoma State court held that civil rights and constitutional violations *cannot* occur during an eminent domain proceeding and the landowners only remedy being to recover the market value of the land and its improvements from only the Respondent, OCURA, in the eminent domain proceeding. This results in a procedural trap.

The Court's dismissal of the civil rights case against Respondents YOUNG, SMITH, RICE and MIDWEST grants them absolute immunity (regardless of their acts)

because YOUNG, SMITH, RICE and MIDWEST are *not* parties in the eminent domain action.

All citizens in Oklahoma can have civil rights actions against local governmental officials, except these Petitioners.

PROPOSITION I

THE DIRECTION BY PUBLIC OFFICIALS (AND CONTRACTOR) TO DESTROY PRIVATE PROPERTY AFTER A NOTICE FILED BY OWNERS OBJECTING TO TAKING AND WITHOUT A PREDEPRIVATION HEARING IN AN EMINENT DOMAIN CASE CREATES A SEPARATE CONSTITUTIONAL AND CIVIL RIGHTS ACTION.

Until title passes to the government, a landowner is free to make whatever use it pleased of its property. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. at 13, 81 L.Ed.2d 1, 104 S. Ct. 2187 (1984).

Okla. Stat. tit. 66, § 53(C) (West 1991) provides that a condemnor shall, at any time before it enters upon said real property, pay to said court clerk the award for use of said owner.

However, the depositing of the award into Court in an Oklahoma condemnation case does not allow a legal entry. The condemnor (and its contractor) does *not* have a legal entry until the pending exceptions are overruled. Our state court has previously discussed this in the *Town of Ames v. Wybrant*, 220 P.2d 693, 695 (Okl. 1950) which provides:

> "Such conclusion could be sound only on the assumption that the law would permit the City

> to take possession before its right so to do is established. Such a taking would be violative of constitutional restrictions and there is no authority therefor. The conclusion is sought to be predicated upon the effect of Tit. 66 O.S. 1941, § 53, permitting the corporation, upon payment of the damages assessed, to enter upon the premises, and upon the cases construing said section. The situation contemplated by the statute and obtaining in the cases construing it *is one where the right to condemn the premises is not in question.* * * * ." (Emphasis supplied)

The Petitioners' absolute statutory right to contest the need and necessity of a taking by exceptions is contained in Okla. Stat. tit. 66, § 55(A) which provides:

> "(A) The report of commissioners may be reviewed by the district court, on written exceptions filed by either party, in the clerk's office within thirty (30) days after the filing of such report; and the *court shall* make such order herein as right and justice may require, either by *confirmation, rejection* or by *ordering a new appraisement* on good cause shown; * * * ." (Emphasis supplied)

The Petitioners filed exceptions questioning the public need and necessity for the project.

With full notice and knowledge the Petitioners wanted to keep their private property until the predeprivation hearing (on the exceptions), the individual directors YOUNG, SMITH and RICE awarded a demolition contract to MIDWEST.

Said acts by YOUNG, SMITH and RICE show a deliberate indifference to the rights of the Petitioners under State eminent domain procedural law.

Until the court confirms the report (overrule the exceptions) allowing the "Report" to stand without objections, the possession and title cannot pass. In *Harn v. State*, 87 P.2d 127, 129 (Okl. 1939) our court said:

> " * * * The report, if allowed to stand without objection, serves to pass the use or title condemned. * * * ."

In *Town of Ames v. Wybrant*, 220 P.2d 693 (Okl. 1950) our court, in "Syllabus by the Court" number 4, said:

> "4. In a condemnation proceeding where the right to condemn is properly in issue it would be a denial of equal protection of the laws to authorize possession before there has been a determination of the right to condemn.

And, in the body of the case, our court said:

> "Therefore the establishment of the right to condemn is a prerequisite to any right of possession by the condemnor. To such effect, we stated in Wrightsman v. Southwestern Natural Gas Co., 173 Okl. 75, 46 P.2d 925, 929: " * * * In such cases denial of a tribunal in which to test the right to condemn prior to possession would be a denial of equal protection of the law."

Wybrant, supra, page 697.

A timely predeprivation hearing must be held "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). The meaningful time and meaningful

manner for the predeprivation hearing in an eminent domain proceeding is at the hearing on the Petitioners' exceptions and *before* the property is destroyed.

Before a person can be deprived of his property by the State, it must accord that person procedural due process. *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972) and *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972). The denial of predeprivation and/or postdeprivation hearings or remedies for property rights can violate Fourteenth Amendment due process and equal protection. See *Parratt v. Taylor*, 451 U.S. 527, 68 L.Ed.2d 420, 101 S. Ct. 1906 (1981) and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 71 L.Ed.2d 265, 102 S. Ct. 1148 (1982).

In *Kirby Forest Indus., Inc. v. United States*, 467 U.S. at 14 and n. 26, 81 L.Ed.2d 1, 104 S. Ct. 2187 this court said:

> " * * * . We conclude, in sum, that petitioner has failed to demonstrate that its interests were impaired in any constitutionally significant way before the Government tendered payment and acquired title in the usual course.[26] * * * ."

And, at note 26:

> "26. Had petitioner made such a showing, complex questions would have arisen regarding the measure of "just compensation." We defer resolution of those questions to a case in which they are fairly presented."

In our case of first impression, Petitioners have shown that the government has not acquired title to the property and has impaired the constitutional rights of the Petitioners in a significant way.

The postdeprivation remedy Ordered by the Oklahoma court in our case at argument is to return to the eminent domain case and collect your market value damages you were going to recover in the first place. This is not an adequate postdeprivation remedy. *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L.Ed.2d 393 (1984).

However, Nichols' The Law of Eminent Domain, revised 3rd Ed., § 8.05(3), page 8-96, (Rel 49-8/91 Pub. 460) states:

> [3]-*Illegal Taking*.
>
> "The rule that damages are to be assessed as of the date of the taking does not contemplate a physical taking not sanctioned by law, but a taking by appropriate legal proceedings. * * * ."

And, see § 12A.04, page 12A-13, (Rel. 45-11/89 Pub. 460) of Nichols, supra, which states:

> § 12A.04 *Assessment Involving an Illegal Taking*
>
> "The rule that damages are to be assessed as of the date of the taking contemplates a taking by appropriate legal proceedings, rather than a physical taking not sanctioned by law. * * * ."

The U.S. Supreme Court has held that § 1983 actions may be brought in state courts. *Maine v. Thiboutot*, 448 U.S. 1, 11-12, 100 S. Ct. 2502, 65 L.Ed.2d 555 (1980).

The Oklahoma Supreme Court has held that state courts must entertain a 42 U.S.C. § 1983 lawsuit. See *Willborn v. City of Tulsa*, 721 P.2d 803, 805 (Okla. 1986) and *Robert K. Bell Enterprises v. Tulsa County Fair*, 695 P.2d 513, 517-19 (Okla. 1985).

PROPOSITION II

THE DENIAL OF BOTH THE PETITIONERS' POSSESSION TO THEIR LAND AND DENIAL OF THE AWARD DEPOSITED INTO COURT IS A VIOLATION OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

When OCURA directors authorized the MIDWEST demolition contract, with pending exceptions, it denied the Petitioners possession rights to *both* the "property" and the "award" by an illegal attempt to force the "award" upon the Petitioners. How can this happen?

In *Henry v. United States*, 46 F.2d 640, 642 (3rd Cir. 1931) the court said:

> "When a property owner accepts the award of damages for taking his property under eminent domain, he cannot raise the question as to the validity of the proceedings or taking."

In *Oklahoma City v. Cooper*, 420 P.2d 508, 512 (Okla. 1966) this court said:

> " * * * . When a property owner accepts the award of damages for taking his property under eminent domain, he cannot raise the question as to the validity of the proceedings or taking. * * * ."

Thus, *if* Petitioners withdrew the "award" from court, they would be waiving Petitioners' "exceptions" and giving up objection to possession. OCURA's depositing the award into court does *not* buy, payoff, waive, continue, eliminate, make retroactive or make an illegal entry legal.

Thus, Petitioners are caught in a "catch 22" procedural due process or equal protection dilemma. *All*

property rights have been taken from the Petitioners for over four years (and continuing) with no relief in sight.

OCURA has its land. Why should it do anything different? This creates a due process violation in which the U.S. Supreme Court should act.

PROPOSITION III

A PRIVATE CONTRACTOR ACTING UNDER COLOR OF LAW BY AND THROUGH A GOVERNMENTAL AGENCY IS LIABLE FOR ITS ACTS PURSUANT TO CIVIL RIGHTS LAW.

Local governmental units going "private" with governmental functions such as police enforcement, prisons, etc. seems to be the latest trend.

Generally, private parties do not act under color of state law. In certain situations, however, private parties expose themselves to liability under constitutional and civil rights (42 U.S.C.A. § 1983) provisions. For example, private parties assisting a state (public) agency in carrying out an unlawful action, or engaging in prohibited conduct with nonimmune state (public) officials, act under color of state law for constitutional and civil rights violation purposes. *Grow v. Fisher*, 523 F.2d 875 (7th Cir. 1975); *Holmes v. Silver Cross Hospital of Joliet*, 340 F. Supp. 125 (N.D. Ill. 1972). Were it otherwise, state (public) officials could insulate themselves from constitutional and civil rights suits by entrusting certain duties to private parties. See *Braden v. University of Pittsburgh*, 477 F.2d 1, 7 (3rd Cir. 1973) and *Tomkins v. Village of Tinley Park*, 566 F. Supp. 70 (N.D. Ill. 1983).

For Tenth Circuit cases from Oklahoma holding private companies liable in the deprivation of property without a hearing, see *Coleman v. Turpen*, 697 F.2d 1341 (10th Cir. 1982) holding the Wrecker Service Company jointly liable and *McKee v. Heggy*, 703 F.2d 479 (10th Cir. 1983) holding Pucketts Wrecker Service Company jointly liable.

A contractor was found to be acting under color of law in *Verdi v. City of Philadelphia*, 553 F. Supp. 334 (E.D. Pa. 1983), where the contractor demolished complainants' property under a contract with the city pursuant to a city building code. Relying on *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744, 73 L.Ed.2d 482 (1982), the court held that the demolition, submitted to be without due process for the owner, was an activity under color of law. The private contracting of governmental services and use of this procedure to avoid § 1983 liability is a subject the U.S. Supreme Court needs to speak out on.

CONCLUSION

In light of the foregoing, Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Oklahoma and the Court of Appeals of the State of Oklahoma, Division No. 2.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Wednesday, April 19, 1995

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

(Filed April 20, 1995)

82,031 *Mary Catherine Borelli McNeil et al. v. Oklahoma City Urban Renewal Authority,* a public body corporate et al.

Certiorari denied.

CONCUR: Wilson, C.J., Kauger, V.C.J., Hodges, Lavender, Simms, Hargrave, Summers, Watt, JJ.

DISSENT: Opala, J.

/s/ Alma Wilson
ALMA WILSON
Chief Judge

APPENDIX B

IN THE COURT OF APPEALS, DIVISION 2

STATE OF OKLAHOMA

MARY CATHERINE BORELLI McNEIL; ET AL.,	)	
Appellants/Plaintiffs,	)	No. 82,031
vs.	)	NOT FOR PUBLICATION
OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a public body corporate; ET AL.,	)	
Appellees/Defendants.	)	

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

Honorable Carolyn R. Ricks, Trial Judge

MEMORANDUM OPINION

(Filed Dec. 27, 1994)

BOUDREAU, P.J.

Plaintiffs appeal an order of the trial court dismissing their action against all Defendants. In this action for trespass and constitutional and civil rights violations, the issue on appeal relates to whether Plaintiffs' action may be pursued in this proceeding when a previously filed condemnation action is pending. We hold that it may not and affirm the trial court.

Condemnor (OCCURA) SUED Condemnees (Plaintiffs) for condemnation of certain property. In that lawsuit, the appointed Commissioners filed their Report.

Plaintiffs filed an exception to the report of the Commissioners contending, among other things, that the project was not necessary and that the condemning authority did not need their land. The condemnor deposited the amount of the commissioner's award into the Court Clerk's Office.

Subsequent to the filing of the report of the commissioners and the depositing of the appropriate monies in the court fund by Plaintiffs, but prior to the trial court ruling on the exceptions of Plaintiffs to the report, the condemnor took possession of the condemned property. It then entered into a contract with Defendant Midwest to demolish a parking lot located on the condemned property. Midwest subsequently performed the demolition.

Plaintiffs contended that the condemnor and Midwest "jumped the gun" and should not have entered onto the property and proceeded with the demolition until such time as the trial court had *ruled* on Plaintiffs' exceptions to the report of the commissioners. (In this particular case, that ruling has still not taken place.) Accordingly, Plaintiffs filed this lawsuit against Condemnor, its three directors, individually, and Midwest, alleging trespass and constitutional and civil rights violations.

All Defendants in the present lawsuit filed a motion to dismiss contending, among other things, that because there was a pending condemnation action to which Plaintiffs were a party, Plaintiffs were required to raise their allegations of damages within that action. The trial judge sustained Defendants' motions to dismiss holding specifically that the dismissals were without prejudice to

Plaintiffs reasserting their claims in the condemnation lawsuit. It is from this ruling that Plaintiffs appeal.

The facts, as they relate to the precise issue upon which the court based its decision, are not in dispute. The issue presented on appeal is a legal one. Contested issues of law are reviewable in all actions, suits, and proceedings by a de novo standard. *Salve Regina College v. Russell*, 499 U.S. 225 (1991). Review of law is called "de novo," which means no deference, not necessarily a full rehearing or new factfinding. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

This case is controlled by the holding of the Oklahoma Supreme Court in *Young v. Seaway Pipeline, Inc.*, 576 P.2d 1148 (Okla. 1977). In *Young*, the condemnee commenced a separate action against the condemnor and other defendants after the condemnor had instituted condemnation proceedings to secure a pipeline right-of-way across condemnee's land. The condemnee alleged as grounds for recovery the violation of state and federal antitrust laws, abuse of process and trespass. In upholding the decision of the trial court in sustaining special demurrers and in refusing to permit the amendment of the petition, the supreme court held that the authority of an entity to exercise the power of eminent domain was part of a condemnation proceeding and could not be collaterally pursued in a separate proceeding. The court also held that any damage for trespass had to be tried in the condemnation proceeding.

It is clear that the operative facts that give rise to Plaintiffs' claims against Condemnor and other Defendants have their origin in the condemnation proceeding.

Plaintiffs claim that Condemnor and other Defendants appropriated their private land without taking all the steps legally requisite to do so. Under the authority of *Young*, this issue and the issue of the resultant damage to Plaintiffs must be determined in the context of the condemnation proceeding. It makes no difference that the alleged damage in this case occurred prior to the time an order confirming the report of the commissioners was entered, see *Delhi Gas Pipeline Corporation v. Swanson*, 520 P.2d (Okla. 1974); or that eminent domain proceedings are proceedings "in rem". See *Allen v. Transok Pipeline Co.*, 552 P.2d 375, 380 (Okla. 1976) (a distinct cause of action for trespass and punitive damages can be tried in the same case as a cause of action for condemnation).

We hold that the trial judge was correct in dismissing the suit filed by Plaintiffs. We further note that the trial judge specifically based her decision dismissing the case on the principle that Plaintiffs could not maintain this action with the condemnation proceeding pending. She made no rulings on any other defenses offered by Defendants in their briefs. Accordingly, we have limited our review to the adjudicated issue.

AFFIRMED.

REIF, C.J., and RAPP, J., concur.

APPENDIX C

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

MARY CATHERINE BORELLI McNEIL, et al., Plaintiffs,	)	
vs.	)	Case No. CJ-92-7943-67
OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a public body corporate, et al., Defendants.	)	

JOURNAL ENTRY

(Filed Aug. 17, 1993)

Defendants' Motions to Dismiss were set for hearing on the 30th day of April, 1993. Prior to that date, the Court informed the parties that Defendants' Motions would be decided upon the briefs submitted and without oral argument. Plaintiffs were represented by their counsel, Richard Hampton; defendants Oklahoma City Urban Renewal Authority, Stanton L. Young, K. E. Smith and Wiley Rice, were represented by their counsel, Batchelor and Powers, P.C., by Dan Batchelor and Janis S. Powers; defendant Midwest Wrecking Co. was represented by its counsel, J. R. "Randy" Baker of the firm Holloway, Dobson, Hudson & Bachman.

After reviewing the pleadings and having read the briefs, the court sustained defendants' motions to dismiss without prejudice to plaintiffs' right to pursue their remedies in the pending condemnation action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' motions to dismiss are hereby sustained and this action is hereby dismissed without prejudice to plaintiffs' right to pursue their remedies in the pending condemnation actions, CJ-90-624-64.

/s/ Carolyn R. Ricks
CAROLYN R. RICKS
JUDGE OF THE
DISTRICT COURT

Supreme Court, U.S.
FILED
AUG 14 1995
OFFICE OF THE CLERK

(2)

No. 95-68

In The

Supreme Court of the United States

October Term, 1995

MARY CATHERINE BORELLI McNEIL, et al.,

Petitioners,

v.

OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a public body corporate, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Oklahoma

RESPONDENT MIDWEST WRECKING COMPANY'S BRIEF IN OPPOSITION

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No. 95-68

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Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Oklahoma

RESPONDENT MIDWEST WRECKING COMPANY'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Your Petitioners' description of the "Proceedings Below" is adequate in the sense that it fairly describes the framework within which the dispute between the various parties has been litigated thus far.

However, Respondent, Midwest Wrecking Company, would additionally bring several matters to the attention of this Court which were rather ambiguously stated and/or not previously addressed at all.

It is undisputed that Co-Respondent, Oklahoma City Urban Renewal Authority ("OCURA") properly instituted a condemnation action against your Petitioners in the District Court of Oklahoma County, Oklahoma on January 23, 1990 (Case No. CJ-90-624).[1] In accordance with Oklahoma Statute, "Commissioners" were appointed to appraise the value of the property. The property was appraised and an award of $74,000.00 was placed with the Clerk of the District Court of Oklahoma County for the benefit of your Petitioners. Thereafter, OCURA contracted with this Respondent, Midwest Wrecking Company, a private company, to perform certain wrecking and removal duties on the subject property, all at the behest and direction of OCURA.

Subsequently, on September 21, 1992, Petitioners instituted a *separate* action regarding the necessity of the taking of the property by OCURA, as well as the amount of the award rendered by the Commissioners. Petitioners named OCURA, individual OCURA Directors, and Midwest Wrecking Company as Defendants in the action for trespass, constitutional violations, and civil rights violations.

All Defendants subsequently moved to dismiss Plaintiffs' 1992 action, claiming that Oklahoma law clearly prohibits institution of a separate, collateral action when a condemnation proceeding is pending. The trial court

---

[1] OCURA's authority to exercise eminent domain powers is codified at 11 O.S. §38-101 et seq. and 66 O.S. §51 et seq.

agreed, and dismissed Plaintiffs' collateral action. Thereafter, the Oklahoma Court of Appeals affirmed the dismissal by Memorandum Opinion (the text of which is provided in Appendix B of Petitioners' Petition for Writ of Certiorari) and, ultimately, the Oklahoma Supreme Court denied Plaintiffs' Petition for Writ of Certiorari regarding the Court of Appeals affirmance of the trial court dismissal (provided in Appendix A of Petitioners' Petition for Writ of Certiorari).

As a result, the Oklahoma courts have unanimously agreed that Oklahoma law prohibits institution of a separate, collateral action regarding the taking of property pursuant to a condemnation action. Your Petitioners now ask this Honorable Court to grant certiorari on the grounds that they believe their constitutional rights have been violated by the dismissal (and subsequent affirmances) of their 1992 collateral action against OCURA, its directors and Midwest Wrecking Company.

Respondent, Midwest Wrecking Company, contends that no constitutional issues are raised by Petitioners herein and that Oklahoma statutory and decisional law strictly prohibit separate, collateral lawsuits arising from the same occurrence which was the basis of the original condemnation action.

SUMMARY OF THE ARGUMENT

Initially, Respondent, Midwest Wrecking Company, would state that the Petitioners have *wholly failed* to provide any "special and important reasons" why this Court should grant certiorari as required by the Rules of the Supreme Court of the United States, Rule 10.1. Each

Oklahoma Court which has addressed the matters at issue in this suit are in agreement; namely, that Petitioners have an adequate remedy under State law to seek redress for their claimed damages. Neither 42 U.S.C. §1983 nor the Fourteenth Amendment to the United States Constitution are violated by requiring Petitioners to seek their remedies in a single lawsuit. To be perfectly clear, Petitioners can either accept the award which has been placed with the Clerk of the District Court at the time of the condemnation *or* they can demand a jury trial regarding both the necessity of the taking of the property as well as the amount awarded for the property itself.[2] There are simply no constitutional issues raised herein.

Additionally (and again contrary to Petitioners' assertions) this is *not* a case of first impression for this Court. This Honorable Court has previously held in *Parratt v. Taylor*, 451 U.S. 526, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) that where state law remedies are in place for property losses suffered (i.e., the pending condemnation action), no due process or other constitutional violations exist. In fact, the United States Government is empowered to acquire land (much like OCURA in the present matter) pursuant to 40 U.S.C. §258 "at any time before judgment" in a condemnation suit by depositing into court for the use of persons so entitled, an amount of money equal to the estimated value of the land.

---

[2] Petitioners' complaint that the condemnation action is yet to be adjudicated is specious. Under Oklahoma Court rules, it is *Petitioner's* responsibility to demand jury trials and request that matters be set for trial. Petitioners herein have never requested a jury trial setting in the pending condemnation action.

In Oklahoma (as well as on the Federal level) an aggrieved condemnee is entitled to his day in court regarding any grievance he may have either as to the necessity of the taking or the amount awarded. However, the actions of a putative state actor (here OCURA) and a private contractor acting under the specific direction of the alleged state actor (here Midwest Wrecking Company) are *not* subject to collateral attack pursuant to the explicit holding in *Young v. Seaway Pipeline, Inc.*, 576 P.2d 1148 (Okla. 1977) which held that collateral matters regarding a condemnation proceeding *may not* be tried in the separate action, but must rather be tried in the condemnation proceeding itself.

As a result, Respondent, Midwest Wrecking Company, asserts that your Petitioners' remedy at law is both adequate and well-defined and that Petitioners' attempt to pursue a separate cause of action against this Respondent is utterly contrary to law and, since no constitutional violations exist thereby, this Court should deny Petitioners' Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

PROPOSITION I

PETITIONERS HAVE WHOLLY FAILED TO ARTICULATE ANY SPECIAL AND IMPORTANT REASONS FOR THE GRANTING OF CERTIORARI AS REQUIRED UNDER THE RULES OF THE UNITED STATES SUPREME COURT

Rule 10 of the Rules of the Supreme Court of the United States clearly states that a Petitioner shall establish *special and important reasons* for the granting of certiorari in a given case. Additionally, Rule 10 enumerates

several factors which are to be considered regarding the Court's discretionary power in either granting or denying certiorari. Among these considerations is whether a State Court of last resort has decided a federal question which has not been, but should be, settled by the United States Supreme Court. Rules of the United States Supreme Court, Rule 10.1(c).

In the instant case, Petitioners' allegations of constitutional violations do not begin to meet this criteria. For example, in *Parratt v. Taylor*, 451 U.S. 526, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) (a case cited by Petitioners herein), this Court held in ruling upon a prisoner's complaint of deprivation of property under color of state law (§1983) that:

> Although the state remedies may not provide the Respondent with all the relief which may have been available if he could have proceeded under §1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process. *The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process.*

Parratt at 101 S.Ct. 1917 (Emphasis supplied).

In the present case, Petitioners broadly assert constitutional violations of "due process". However, Petitioners fail to articulate any manner in which their present state law remedy is inadequate. Petitioners' only argument in this regard is that they cannot sue the individual OCURA board members and this Respondent, Midwest Wrecking Company, in a separate action for trespass and civil rights violations. In this, Petitioners are correct. However, this

does *not* mean that Petitioners are left without adequate remedy at law. It is in fact, *Petitioners* who want to "have their cake and eat it too". Petitioners do not want to pursue their claims in the condemnation action as provided by law. They want a *separate* action for trespass and constitutional rights violations which is simply prohibited by Oklahoma law and – law which is *not* in conflict with the United States Constitution or any decisions rendered by this Honorable Court. *All damages* to which Petitioners may be entitled are available through the condemnation action itself.

As a result, Respondent, Midwest Wrecking Company, respectfully requests that this Court deny Petitioners' Petition for Writ of Certiorari on the grounds that Petitioners have failed to establish "special and important reasons" for the granting of certiorari in this case as required by the United States Supreme Court Rules.

PROPOSITION II

PETITIONERS' STATE LAW REMEDIES ARE ADEQUATE AND NO CONSTITUTIONAL PROVISIONS ARE VIOLATED THEREBY

It has long been recognized by the Oklahoma Supreme Court that the condemnation procedure codified at 66 O.S. §§53 and 55 (as set out in Petitioners' Petition for Writ of Certiorari) afford the *only* forum and process to recover damages which may have resulted from a condemnation action. For example, in *Delhi Gas Pipeline Corp. v. Swanson*, 520 P.2d 670 (Okla. 1974), a pipeline company with the right of eminent domain filed a condemnation proceeding to acquire a right-of-way. On the

same day that the report of the commissioners was approved by the trial court, the condemnee filed a separate lawsuit against the condemnor and against the contractor hired by the condemnor to go onto the property for purposes of doing those acts of construction and/or demolition in furtherance of the condemnation plan.

In holding that the trial court had no jurisdiction to entertain the separate lawsuit maintained by the condemnee, the Supreme Court of Oklahoma noted at page 672:

> In *Graham v. City of Duncan*, Okl. 354 P.2d 458, we quoted the applicable rule from *State of Oklahoma v. Adams*, 187 Okl. 673, 105 P.2d 416, as follows:
>
> > " . . . the owner must recover in *one action*, 'all damages which have resulted, or are reasonably liable to result in the future, from a proper construction or operation of the improvement, and that no subsequent action will be to recover for items which might have been considered in the original proceeding.' " (Emphasis supplied)

Additionally, in *Young v. Seaway Pipeline, Inc.*, 576 P.2d 1148 (Okla. 1977), the condemnee commenced a separate action against the condemnor and other Defendants after the condemnor had instituted condemnation proceedings to secure a pipeline right-of-way across condemnee's land. The condemnee alleged violation of state and federal antitrust laws, abuse of process and trespass. In *Young*, the Oklahoma Supreme Court held that the authority of an entity to exercise the power of eminent domain *was part of a condemnation proceeding and could not*

be collaterally pursued in a separate proceeding. The *Young* Court also held that any damage for trespass had to be tried in the condemnation proceeding.

Here, your Petitioners are requesting that this Court grant certiorari for the purpose of declaring the holding in the *Young* case unconstitutional as being in violation of some unspecified constitutional right of the Petitioners. It is difficult to understand how Petitioners can claim prejudice, injury or violation of their constitutional rights when their remedy is clearly provided at law within the condemnation proceeding.

As further support, this Respondent would direct the Court's attention to an opinion written by Justice Stevens (then Judge Stevens) for the Seventh Circuit. In *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932, 98 S.Ct. 1507, 55 L.Ed. 2d 529 (1978), a prisoner alleged constitutional violations against prison officials for wrongful removal of the prisoner's property from his cell. The question presented was whether negligence may support a recovery under 42 U.S.C. §1983. In *Bonner*, the Seventh Circuit held at page 1319:

> For in a case such as this [state law] provides, in substance, that the Plaintiff is entitled to be made whole for any loss of property occasioned by the unauthorized conduct of the prison guards. We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment.

Indeed, the United States Supreme Court has cited the *Bonner* case favorably in *Parratt v. Taylor, supra,* finding at 101 S.Ct. 1917:

> To accept Respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under §1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under §1983. Such reasoning "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States". *Paul v. Davis,* 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed. 2d 405 (1976). We do not think that the drafters of the Fourteenth Amendment intended the amendment to play such a role in our society.

It is well established that neither this Honorable Court nor federal courts below will countenance actions for constitutional violations where there exist, at law, adequate remedies for an aggrieved Plaintiff. As succinctly stated by the Eighth Circuit in *Edwards v. Arkansas Power & Light Co.,* 683 F.2d 1149, 1155 (8th Cir. 1982): " . . . due process entitles a landowner to nothing more than just compensation for the land taken . . . ".

Petitioners' cited authorities do not bolster their position. To the contrary, Petitioners' authorities militate in

favor of Respondents. In addition to *Parratt, supra,* Petitioners also cite *Hudson v. Palmer,* 468 U.S. 517, 104 S.Ct 3194, 82 L.Ed.2d 393 (1984) for the proposition that their remedy is inadequate. However, the *Hudson* Court ruled as follows at 104 S.Ct. page 3204:

> "we hold that an unauthorized intentional deprivation of property by a state employee *does not* constitute a violation of the procedural requirements of the due process laws of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available. (Emphasis supplied)

The rulings of this Court have been consistent: There is no violation of a due process right where the state provides a hearing to address Petitioners' claims. In this case, the condemnation proceeding is *precisely* the mechanism by which due process is afforded the Petitioners.

PROPOSITION III

RESPONDENT MIDWEST WRECKING COMPANY IS IMMUNE FROM LIABILITY UNDER SECTION 1983

It has been recognized that a private contractor (such as Respondent, Midwest Wrecking Company) cannot be held liable for any alleged procedural violations while acting under the direction of a condemning authority. For example, in *O'Grady v. City of Montpelier,* 474 F.Supp. 186 (D.Ver. 1979), a private contractor entered into a contract with the City to perform construction work on city streets. Plaintiffs brought an inverse condemnation suit against the contractor claiming (1) that the contractor violated the Plaintiffs' right to just compensation under the Fifth and Fourteenth Amendments of the United

States Constitution by causing damage to their property without payment, and (2) that the actions violated the Plaintiffs' due process rights because Defendants changed the road grade without meeting the notice and hearing requirements set forth in the Montpelier City Charter.

In addressing Plaintiffs' claims against the contractor, the Court stated at page 187:

> . . . [I]t is well established that such a cause of action will lie only against the public body or corporation authorized to exercise the power of eminent domain. An action for inverse condemnation *will not lie against a private contractor* who merely performs a construction contract for the government in accordance with authorized governmental specifications. (Emphasis supplied)

Additionally, the United States Court of Appeals for the Tenth Circuit has had an opportunity to address the efficacy of a claim against one who is acting under the direction of a putative state actor. In *McClelland v. Facteau*, 610 F.2d 693 (10th Cir. 1979), the Tenth Circuit held that a Defendant *cannot be liable* under a *respondeat superior* theory in a §1983 case. Since it has not been alleged (nor can it be proven) that Respondent, Midwest Wrecking Company, acted in any manner inconsistent with the specific direction of OCURA and as Petitioners have wholly failed to allege or identify any *independent* constitutional violation whatsoever on the part of Respondent, Midwest Wrecking Company, it *cannot* be liable under Petitioners' Constitutional claims.

Consideration should also be given to *Myers v. United States*, 323 F.2d 580 (9th Cir. 1963), where the Ninth Circuit denied any recovery against a defendant construction company stating at page 583:

> To the extent that the work performed by . . . [the contractor] was done under its contract with [the government], and in conformity with the terms of said contract, no liability can be imposed upon it for any damages claimed to have been suffered by the appellants.

Therefore, not only are Petitioners limited to asserting their claims in the subject condemnation action, Respondent, Midwest Wrecking Company, cannot be held liable *in any event* for performing functions under the direction and control of OCURA. When Petitioners claim that they have no remedy, what they really mean is that the remedy they have does not suit them. However, their remedy is, in all respects, constitutionally sound as it specifically allows Petitioners to address their concerns regarding both the propriety of the taking and the amount of the award *in* the condemnation procedure outlined in Oklahoma statutory and decisional law. To this, they are lawfully entitled, and, in this respect, Oklahoma law fully comports with all Constitutional requirements of due process alleged to be lacking by Petitioners herein.

CONCLUSION

Each Court which has addressed these Petitioners' claims has held that the owner of land which is to be condemned must recover in the condemnation proceedings all damages which have resulted, or are likely to result, in the future from the condemnation. The Courts have unanimously agreed that a subsequent action will not lie to recover for items of damage which might have been considered in the original proceeding. It has also been recognized that an agent who merely performed the construction contract cannot be held liable for any procedural due process violations allegedly committed by another.

The issues raised by Petitioners are neither novel nor of first impression. The decision of the Oklahoma Supreme Court in denying Petitioners' Petition for Writ of Certiorari is not in conflict with federal law nor do there exist any "special and important reasons" for the United States Supreme Court to address the propriety of the Oklahoma Supreme Court decision.

No matter the approach, the result is the same: Your Petitioners may recover any and all damages to which they are entitled in the pending condemnation proceeding. Oklahoma law does not permit a collateral lawsuit regarding these alleged damages. Petitioners can establish no constitutional violation occasioned upon them by the enforcement of the Oklahoma statutory and decisional scheme. As a result, Respondent, Midwest Wrecking

Company, respectfully requests that this Court enter an Order denying the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

40 U.S.C. §258(a) Lands, easements, or rights of way for public use; taking of possession and title in advance of final judgment; authority; procedure

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto –

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in court, to use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the

use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest in accordance with section 6 of this Act on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person, entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

(As amended Nov. 14, 1986, Pub.L 99-656, §1(1), 100 Stat. 3668)

(3)

Supreme Court, U.S.
FILED
AUG 16 1995
OFFICE OF THE CLERK

No. 95-68

In The

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October Term, 1995

MARY CATHERINE BORELLI McNEIL; et al.,

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OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a public body corporate; et al.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Oklahoma

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Respondents reject the Petitioners' characterization of the questions presented. The following question regarding jurisdiction should be initially considered:

1) Whether the Petitioners have presented any constitutional or federal question or other basis upon which this Court should accept a petition for writ of certiorari?

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No. 95-68

In The

Supreme Court of the United States

October Term, 1995

MARY CATHERINE BORELLI McNEIL; et al.,

Petitioners,

v.

OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a public body corporate; et al.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Oklahoma

BRIEF IN OPPOSITION

OPINIONS AND JUDGMENTS DELIVERED IN STATE COURTS BELOW

Three of the opinions relevant to this case are reprinted in the Appendix to the Petition for Certiorari at A1, B1-B4 and C1-C2. A further judgment, mentioned but not reprinted by the Petitioner, is the agreed Order Denying Injunctive Relief entered by the District Court of Oklahoma County denying Petitioner's request for injunctive relief in the condemnation action which gave rise to the acts complained of herein by Petitioner and to which Petitioner must look for resolution of those complaints – *Oklahoma City Urban Renewal Authority v. Borelli,* CJ-90-624. A copy of that agreed order is reprinted as

Appendix A1-A5 to this Brief of Respondents in Opposition to the Petition for Writ of Certiorari. Also reprinted, as Appendix B1-B4 to this Brief of Respondents, is the decision of the Court of Appeals of the State of Oklahoma, Division No. 1, affirming the denial of injunctive relief by agreed order and denying Petitioners' attempted appeal therefrom. *Oklahoma City Urban Renewal Authority v. Borelli,* 848 P.2d 33 (Okl.App. 1992).

JURISDICTION

Petitioners have failed to establish a jurisdictional basis for review by this Court under 28 U.S.C. § 1257 or Rule 13.1 of the Rules of the Supreme Court. The facts and circumstances of this case simply do not present constitutional or federal question issues requiring resolution. The last decision in this case was rendered by the Oklahoma Supreme Court.

STATUTORY PROVISIONS

In addition to the statutory provisions set forth by Petitioners in their brief, Respondents note the following:

Title 66, Okl. Stat. § 53(C) provides, in pertinent part:

> [I]f said [condemnor] shall, at any time before it enters upon said real property . . . , pay to said clerk [of the court] for the use of the owner the sum so assessed and reported to him as aforesaid [by the report of commissioners appointed by the court], it shall be authorized to

construct and maintain its [improvements] over and across said premises.

Title 66, Okla. Stat. § 54 provides:

> When possession is taken of property condemned, as provided herein, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of said compensation.[1]

STATEMENT OF THE CASE

The facts relevant to this Court's consideration of the Petition for Writ of Certiorari are these. The Oklahoma City Urban Renewal Authority ("OCURA") filed condemnation proceedings to acquire property belonging to Petitioners on January 23, 1990. The Report of the court-appointed commissioners, setting the value of the property, was filed on May 14, 1990, and on the same day, OCURA deposited the amount of the award with the court clerk's office, from which it could be withdrawn by Petitioners at any time.[2]

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[1] This statute is interpreted to mean that withdrawal of the commissioners' award by the condemnee serves to waive exceptions to the report of commissioners, if still pending, but does not waive a pending demand for jury trial (by which the sufficiency of damages is reviewed).

[2] While it may be true that, under Oklahoma law, a condemnee waives adjudication of any pending exceptions to the report of commissioners *if* the condemnee withdraws the funds *prior* to a hearing on the exceptions, this is the choice of the

Within the statutorily prescribed time, Petitioners filed exceptions to the report of commissioners, challenging OCURA's right to take, and a demand for jury trial to appeal the amount of damages awarded.[3]

OCURA took possession of the condemned property and, on September 19, 1990, the Board of Commissioners of OCURA approved a contract with Midwest Wrecking Co. ("Midwest") to clear the property of its improvements – the asphalt parking lot surface. Thereafter, Midwest cleared the lot and, on October 17, 1990 – *after* the demolition was completed – Petitioners filed in the condemnation proceedings an "Application for a Court Order to Stop [OCURA's] Trespass and Maintain the Status Quo **Until** the Due Process Violations Exceptions and Objections Are Resolved and/or Dismissal of this Cause" (emphasis added). This was a request for a temporary injunction, until the issues specified could be resolved.[4]

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condemnee. There is nothing to prevent the condemnee from proceeding with judicial adjudication of pending exceptions and *then* withdrawing the funds if the condemnor's right to take is upheld. See 66 Okla. Stat. § 54. Petitioners' suggestion that OCURA and/or its Commissioners "denied the Petitioners possession rights to *both* the "property" and the "award" by an illegal attempt to force the "award" upon the Petitioners" (at p. 15 of their brief herein) is a gross distortion of both the facts and the law in this case, and is completely unsupported by any possible interpretation of either.

[3] Jury trial of the sufficiency of the damages set by the appraisement of the court-appointed commissioners is considered an appeal from the report of commissioners.

[4] This is precisely the type of opportunity which the Oklahoma Supreme Court indicated would be available in a proper case in its opinion in *Ames v. Wybrandt*, 220 P.2d 693 (Okla. 1950), as discussed below.

On January 3, 1991, an agreed Order Denying Injunctive Relief was entered solely by approval and agreement of the parties, without hearing or determination by the court, as was confirmed by the Oklahoma Court of Appeals, Division No. 2. (See Appendix B1-B4 hereto.) That agreed Order, reprinted as Appendix A1-A5 to this brief, included the following findings:

> THE COURT FURTHER FINDS that on May 14, 1990, the Plaintiff obtained title to the property involved in this case when it tendered to the Court Clerk money in the amount of the Commissioners' Award set in this case, plus Commissioners' Fees and poundage.
>
> THE COURT FURTHER FINDS that the Plaintiff took possession and custody of the property involved in this case shortly after title passed to the Plaintiff on May 14, 1990.
>
> THE COURT FURTHER FINDS that the Court's denial of injunctive relief should not and is not a ruling upon the merits of the Landowners' Exceptions or objections to the Plaintiff's right to take or to the "Report of Commissioners" and the same are preserved for subsequent adjudication.

The agreed Order:

> . . . ORDERED, ADJUDGED AND DECREED that the Landowners' prayer for relief by way of their Application (whether the same be considered an injunction, temporary injunction, restraining order, temporary restraining order or stay) to prevent Plaintiff from proceeding with the clearing and removal of improvements from the Landowners' "parking lot" property condemned in this case is hereby denied.

> . . . FURTHER ORDERED, ADJUDGED AND DECREED that this ruling does not reach the merits of the Landowners' Exceptions or objections to the "Report of Commissioners" or the Plaintiff's right to take in this case and the same are preserved for subsequent adjudication.[5]

The agreed Order Denying Injunctive Relief was upheld by the Oklahoma Court of Appeals, Division No. 2. *Oklahoma City Urban Renewal Authority v. Borelli*, 848 P.2d 33 (Okl.App. 1992), reprinted here as Appendix B1-B4. The Oklahoma Supreme Court declined to review this decision, denying Petitioners' request for a writ of certiorari.

After the decision of the Court of Appeals and prior to the denial of the writ of certiorari, Petitioners filed this action challenging the condemnation action, couched as an action in trespass and deprivation of constitutional and civil rights. (District Court of Oklahoma County, CJ-92-7943-67.)

The district court sustained Respondents' Motion to Dismiss. Appendix C1-C2 to Petitioners' brief herein.

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[5] Petitioners' claim, at page 14 of their brief herein, that "[t]he postdeprivation remedy Ordered by the Oklahoma court in our case at argument is to return to the eminent domain case and collect your market value damages you were going to recover in the first place" is categorically wrong. Petitioners were not deprived of a "postdeprivation remedy", but rather, entered into an agreed Order Denying Injunctive Relief which specifically orders preservation of the questions raised by Petitioners' Exceptions to the Report of Commissioners in the condemnation action (OCURA's right to take Petitioners' property) and, by extension, the issues raised by Petitioners in this action, as well.

Petitioners appealed that decision, which was upheld by the Oklahoma Court of Appeals. See Appendix B1-B4 to Petitioners' brief herein. The Oklahoma Supreme Court denied Petitioners' request for a writ of certiorari. See Appendix A1 to Petitioners' brief herein. Petitioners next filed their Petition for Writ of Certiorari herein.

ARGUMENT

THE COURT SHOULD DENY THE PETITION AS THERE IS NO BASIS FOR REVIEW BY THIS COURT

- Petitioners were not denied possession of the commissioners award.
- The decisions of the Oklahoma courts do not confer "absolute immunity" on Respondents.
- Petitioners have not been denied either a pre- or post-deprivation hearing.

Proposition I

Petitioners Have Not Been Deprived Of A Hearing

The determination of the Petition for Writ of Certiorari herein is fact dependent. As compelling as the "Questions Presented" stated by Petitioners may (or may not) be, they simply have no application to this case.

Petitioners ask whether denial of a predeprivation hearing and possession of their land for two years (and continuing), is a violation of the due process clause of the Fourteenth Amendment. In point of fact, Petitioners have not been denied a predeprivation hearing in violation of the Fourteenth Amendment.

If Petitioners were entitled to a *pre*deprivation hearing, they voluntarily relinquished or waived that right when they entered into the agreed Order Denying Injunctive Relief. Therefore, Petitioners' claims of constitutional deprivation are hollow and misleading.

Under the law of Oklahoma, the exercise of the power of eminent domain, allegations as to trespass and damages related thereto, may not be collaterally pursued in a separate proceeding where, as here, a condemnation action is pending. *Young v. Seaway Pipeline, Inc.*, 576 P.2d 1148 (Okla. 1977). This Petition for Writ of Certiorari arises from the dismissal by the district court of Petitioners' cause of action attempting to separately and collaterally challenge a pending condemnation action.

The claims of Petitioners (condemnees) must be resolved within and as a part of the condemnation action. *Young v. Seaway Pipeline, Inc., supra,* and *Delhi Gas Pipeline Corp. v. Swanson,* 520 P.2d 670 (Okla. 1974).

In *Seaway,* the landowner filed suit against the pipeline company after condemnation procedures had been instituted by Seaway to secure a pipeline right-of-way across the landowner's property. The landowner alleged antitrust violations and trespass.

The trial court sustained Seaway's demurrers to the petition and refused to permit the landowner to amend on the grounds that the petition was not amendable to any amendment which would state a cause of action. On appeal, this decision was affirmed.

The Oklahoma Supreme Court found it unnecessary to address the antitrust allegations. Because there was a

pending condemnation action, the Court found that the landowner was not entitled to collaterally challenge in a separate proceeding the authority of the pipeline company to exercise the power of eminent domain, and that any damage for trespass was part of the condemnation proceeding.

In *Delhi Gas Pipeline Corp. v. Swanson, supra,* the Oklahoma Supreme Court assumed original jurisdiction and granted a writ of prohibition to prevent the trial court from proceeding with landowners' action to recover damages in a trespass action.

The pipeline company had entered onto the landowners' property to begin construction during negotiations with the landowners. When no agreement could be reached, Delhi instituted condemnation proceedings.

The report of commissioners was confirmed by the trial court, finding that Delhi had the right to exercise the power of eminent domain and that the taking was necessary. Exceptions to the report of commissioners were overruled.

The landowners then filed suit against Delhi and its contractor alleging trespass. Delhi filed a motion to dismiss, which was overruled. Delhi then applied to the Oklahoma Supreme Court to assume original jurisdiction and issue a writ of prohibition.

The landowners contended they were entitled to maintain the trespass action because Delhi had taken an amount of land in excess of that reasonably necessary for its purposes.

The Court emphasized that all damage in the case occurred prior to the time the trial court entered the order confirming the report of commissioners. The Court also reiterated that questions concerning the right to condemn must be resolved in the condemnation action by exceptions to the report of commissioners, citing *Wrightsman v. Southwestern Natural Gas Co.*, 46 P.2d 925 (Okla. 1935).

The Court reaffirmed prior decisions holding that where the damage had occurred prior to trial in the condemnation proceeding, the condemnee could recover in the condemnation proceeding for all of his damages, irrespective of negligence, *citing Cities Service Co. v. Huebner,* 197 P.2d 985 (Okla. 1948). *Graham v. City of Duncan,* 354 P.2d 458 (Okla. 1960) was also cited, holding:

> [T]hat the owner must recover in one action all damages which have resulted, or are reasonably likely to result from a proper construction or operation of the improvement, and **no subsequent action will lie** to recover for items which might have been considered in the original proceeding.

quoting State of Oklahoma v. Adams 105 P.2d 416 (Okla. 1940) (*emphasis added*).

The action underlying this Petition for Writ of Certiorari sounds in tort, primarily trespass. Despite Petitioners' unsupported allegations of *ultra vires* action,[6] and

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[6] Although Petitioners named as defendants in this action – both individually and in their official capacity – the three members of the Board of Commissioners of OCURA who voted to approve the contract to demolish the improvements on the condemned property (as well as the demolition contractor), no

claims of constitutional violation, it is still nothing more than a challenge to the necessity of the condemnation and OCURA's authority to condemn Petitioners' land.

These matters must be resolved in the pending condemnation action under the holdings in *Seaway* and *Delhi, supra,* and Petitioners have the opportunity to do so by virtue of their pending exceptions to the report of commissioners and the provisions of the agreed Order Denying Injunctive Relief expressly preserving these issues for determination. Petitioners have not been denied a hearing but, rather, **agreed** to preserve these issues until the hearing on their exceptions to the report of commissioners.

Proposition II

Petitioners Have Not Been Deprived Of The Commissioners' Award

It simply is not true that Petitioners have been deprived of the possession of both their property and the commissioners' award in the condemnation action by OCURA and/or the members of its Board of Commissioners named as defendants in this action (Respondents). Petitioners remain free at any time to withdraw the commissioners' award from the court. If Petitioners did not want to risk foreclosure of the determination of their exceptions to the report of commissioners, they could have at any time, and may even now, seek to have their exceptions set down for hearing. Instead, Petitioners have pursued injunctive relief and appeal from the

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indication of any action or motive outside the normal course of OCURA's procedure has been given.

agreed Order denying that relief, as well as this separate proceeding collaterally attacking the right to take and the procedures followed by Respondents in the condemnation proceedings.

Petitioners claim the burden is on Respondents (condemnor) to seek hearing on Petitioners' exceptions, but this claim is unsupported by authority and is contrary to Oklahoma statutes. 66 Okla. Stat. §§ 53(C), 54.

Petitioners' citation to, and quote from, *Ames v. Wybrandt*, 220 P.2d 693 (Okla. 1950), is not entirely clear. *Ames* challenged the constitutionality of Oklahoma's condemnation procedure, claiming it denied condemnees of their property without due process because it seemed to permit the condemnor to take possession *without any opportunity* for the condemnee to first obtain a hearing on the right to take, as raised by exceptions to the report of commissioners. This, the Court said, would be unconstitutional. The Oklahoma Supreme Court stated in *Ames*:

> [W]e deem it well to say that the District Court after objection to the Commissioners' report or the trial judge prior thereto in a proper case and upon proper application and showing . . . could make an order restraining the condemnor from taking possession of the land pending final determination of the right to condemn.

220 P.2d at 696, citing *Wrightsman v. Southwestern Natural Gas Co.*, 46 P.2d 925 (Okla. 1935) (emphasis added).

Ames does not assign responsibility for obtaining such an order, or for setting the hearing on the exceptions, but logic would dictate that such responsibility would fall to the party wanting such hearing. In fact,

Petitioners did seek injunctive relief in the condemnation action at issue here, but Petitioners entered into an agreed Order Denying that Injunctive Relief and cannot now complain they were denied the opportunity for a hearing.

Proposition III

The Decisions Below Do Not Confer Immunity Upon Respondents

Petitioners' claim that the decisions of the district court and the court of appeals below somehow confer "absolute immunity" upon Respondents, because not all Respondents are parties to the underlying condemnation action, is incomprehensible. While Respondents agree that the issues raised by Petitioners must be resolved in the still-pending condemnation action, Petitioners have made no attempt to bring the additional Respondents into the condemnation action as parties in order to assert these claims against them. The holding in *Graham v. City of Duncan, supra,* would indicate that this is not only possible, but is required.

CONCLUSION

Petitioners have not established a jurisdictional basis for this Petition for Writ of Certiorari. There simply are no constitutional or federal question issues requiring resolution in this case. The Questions Presented, as framed by Petitioners, are not applicable to the facts here. In view of the foregoing, Respondents respectfully request

that this Court deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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Counsel for Respondents

APPENDIX A

IN THE DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA

OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a Public Body Corporate	)	
Plaintiff,	)	No. CJ-90-624
vs.	)	(Filed
MARGARET R. BORELLI and JOHN W. BORELLI, wife and husband; MARGARET ANNA BORELLI FENT and JERRY R. FENT, wife and husband; JOHN W. BORELLI, JR. and MARIANNE DULLE BORELLI, husband and wife; MARY CATHERINE BORELLI McNEIL and EDD R. McNEIL, wife and husband; ELIZABETH ANN FENT BORDERS and RICHARD CHRISTOPHER BORDERS, wife and husband; DAVID JAROME FENT; MARGARET MARY FENT; ELEANOR MARY BORELLI, a Minor; STEVEN THOMAS BORELLI, a Minor; MARGUERITE CLAIRE BORELLI, a Minor; JENIFER NICOLE McNEIL, a Minor; SARAH FAITH McNEIL, a Minor; JOE B. BARNES, County Treasurer of Oklahoma Oklahoma County; and BOARD OF COUNTY COMMISSIONERS OF OKLAHOMA COUNTY,	)	Jan. 3, 1991)
Defendants.	)	

ORDER DENYING INJUNCTIVE RELIEF

Now on this date there comes on for hearing the Application for relief filed by the Defendants, MARGARET R. BORELLI and JOHN W. BORELLI, wife and husband; MARGARET ANNA BORELLI FENT and JERRY R. FENT, wife and husband; JOHN W. BORELLI, JR. and MARIANNE DULLE BORELLI, husband and wife; MARY CATHERINE BORELLI McNEIL and EDD R. McNEIL, wife and husband; ELIZABETH ANN FENT BORDERS and RICHARD CHRISTOPHER BORDERS, wife and husband; DAVID JAROME FENT; MARGARET MARY FENT; ELEANOR MARY BORELLI, a Minor; STEVEN THOMAS BORELLI, a Minor; MARGUERITE CLAIRE BORELLI, a Minor; JENIFER NICOLE McNEIL, a Minor; SARAH FAITH McNEIL, a Minor; with said minor Defendants being represented by their Guardian Ad Litem Defendants as per the prior Order of the Court, and all said Defendants being hereinafter called "the Landowners".

Present are Edd R. McNeil, Attorney for the Landowners, and James Dan Batchelor, attorney for the Plaintiff, OKLAHOMA CITY URBAN RENEWAL AUTHORITY. After being fully informed in the premises, the Court makes the following findings of fact and conclusions of law.

THE COURT FINDS that on the 17th day of October, 1990, the Landowners filed with the Court Clerk a pleading captioned:

> DEFENDANT'S APPLICATION FOR A COURT ORDER TO STOP THE PLAINTIFF'S TRESPASS AND MAINTAIN THE STATUS QUO UNTIL THE DUE PROCESS VIOLATIONS, EXCEPTIONS AND OBJECTIONS ARE RESOLVED

AND/OR DISMISSAL OF THIS CAUSE (WITH BRIEF INCLUDED)

THE COURT FINDS that it is clear that the Landowners seek injunctive relief to prevent the Plaintiff from proceeding with the clearing and removal of improvements from the Landowners' "parking lot" property condemned in this case until such time as the Court has considered and ruled upon the Defendants' Exceptions to the "Report of Commissioners" which includes numerous objections to the Plaintiff's right to condemn in this case.

THE COURT FURTHER FINDS that on May 14, 1990, the Plaintiff obtained title to the property involved in this case when it tendered to the Court Clerk money in the amount of the Commissioners' Award set in this case, plus Commissioners' Fees and poundage.

THE COURT FURTHER FINDS that the Plaintiff took possession and custody of the property involved in this case shortly after title passed to the Plaintiff on May 14, 1990.

THE COURT FURTHER FINDS that the Landowners filed their Exceptions to the "Report of the Commissioners" on May 29, 1990, within the time required by law and said Exceptions are still pending before the Court.

THE COURT FURTHER FINDS that the Plaintiff has completed its demolition of the improvements on the Landowners' property.

THE COURT FURTHER FINDS after considering the arguments of counsel and the authorities of law that the Landowners' Application for Relief (whether the same be characterized as an injunction, temporary injunction,

restraining order, temporary restraining order or stay) is not warranted by the facts in this case and, therefore, the same should be denied.

THE COURT FURTHER FINDS that the Court's denial of injunctive relief should not and is not a ruling upon the merits of the Landowners' Exceptions and objections to the Plaintiff's right to take or to the "Report of Commissioners" and the same are preserved for subsequent adjudication.

THE COURT FURTHER FINDS that it recently considered a similar matter arising out of the same Urban Renewal project in the case of *OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a Public Body Corporate, Plaintiff vs. A. E. HIGGANBOTHAM, et al, Defendants;* Oklahoma County District Court Case No. CJ-89-9251.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Landowners' prayer for relief by way of their Application (whether the same be considered an injunction, temporary injunction, restraining order, temporary restraining order or stay) to prevent Plaintiff from proceeding with the clearing and removal of improvements from the Landowners' "parking lot" property condemned in this case is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this ruling does not reach the merits of the landowners' Exceptions or objections to the "Report of Commissioners" or the Plaintiff's right to take in this case and the same are preserved for subsequent adjudication.

DATED this 3 day of January, 1991.

/s/ Leamon Freeman
JUDGE OF THE
DISTRICT COURT

I, TOM PETUSKEY, Court Clerk for Oklahoma County, Okla., hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of record in the District Court Clerk's Office of Oklahoma County, Oklahoma this 9 day of January, 1991.

TOM PETUSKEY, Court Clerk
By /s/ Bertha Chamberlain, Deputy

APPROVED:

/s/ Dan Batchelor
James Dan Batchelor, OBA #594
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(405) 622-3322
Attorney/Defendant for all
Defendant Landowners

APPENDIX B

OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a Public Body Corporate, Appellee,

v.

Margaret R. BORELLI and John W. Borelli, wife and husband; Margaret Anna Borelli Fent and Jerry R. Fent, wife and husband; John W. Borelli, Jr. and Marianne Dulle Borelli, husband and wife; Mary Catherine Borelli McNeil and Edd R. McNeil, wife and husband; Elizabeth Ann Fent Borders and Richard Christopher Borders, wife and husband; David Jarome Fent; Margaret Mary Fent; Eleanor Mary Borelli, a minor; Steven Thomas Borelli, a minor; Marguerite Claire Borelli, a minor; Jennifer Nicole McNeil, a minor; Sarah Faith McNeil, a minor, Appellants.

No. 76895.

Released for Publication by Order of the Court of Appeals of Oklahoma, Division No. 1.

Court of Appeals of Oklahoma,
Division No. 1.

Aug. 25, 1992.

Certiorari Denied Feb. 9, 1993.

Appeal was taken from order of the District Court, Oklahoma County, Leamon Freeman, J., which denied request for injunction. The Court of Appeals, Bailey, J., held that appellants who had consented to order denying injunction could not appeal from the denial of relief.

Affirmed.

Appeal from the District Court of Oklahoma County; Leamon Freeman, Judge.

AFFIRMED.

Edd R. McNeil, Hurst & McNeil, Sulphur, for appellants.

Dan Batchelor, Barry W. Johnson, Batchelor and Johnson, P.C., Oklahoma City, for appellee.

BAILEY, Judge:

Appellants seek review of the Trial Court's order denying Appellants' application to enjoin Appellee Oklahoma City Urban Renewal Authority (OCURA) from demolition of improvements to and possession of certain real property sought to be condemned by OCURA. Herein, Appellants complain that, despite the consent nature of the order below denying injunctive relief, OCURA had no authority to continue possession of the subject property.

In January 1990, OCURA filed Petition to Select and Summon Commissioners to condemn certain real property (specifically, parking lots) owned by Appellants. The Commissioners filed their Report in May 1990, and OCURA paid into court the amount designated in the Report. Two weeks later, Appellants filed Exceptions to the Report of Commissioners, contesting OCURA's power to condemn the property.

Demolition of improvements on the property began October 1, 1990. On October 17, 1990, Appellants applied for injunctive relief, seeking to enjoin OCURA's actions until hearing on Appellants' Exceptions to the Report of Commissioners. Hearing thereon was twice continued

and subsequently stricken on December 7, 1990. On January 3, 1991, the parties submitted to the Trial Court for signature an agreed-to order, signed by respective counsel, denying Appellants the requested injunctive relief, but reserving Appellants' exceptions and objections to Report of Commissioners for subsequent adjudication.

The following day, Appellants filed their petition-in-error challenging this order. Thereafter, OCURA filed Motion to Clarify, Correct and Supplement the Record and Order Appealed From in the Supreme Court, which the Trial Court granted. Pursuant thereto, the Trial Court entered an order amending the record nunc pro tunc to reflect filing of the January 3, 1991 order "solely pursuant to approval and agreement of the parties" without hearing or determination by the Trial Court.

Appellants forward numerous challenges to OCURA's authority to condemn, obtain title to, demolish improvements on, and possess property prior to a hearing on the Appellants' objections thereto. However, we view the dispositive issue in this case as whether Appellants are entitled to appeal from an order to which Appellants consented and agreed. In that regard, although Appellants assert that by agreeing with and consenting to the order denying injunctive relief they were merely "agreeing to disagree," we find nothing in the record to support this contention. On the contrary, the order itself – and the subsequent order amending the first order *nunc pro tunc* – clearly reflects the intent of the parties to resolve the injunction issue by agreement and without hearing.

Where the record reflects entry of an adverse decision with the consent of the appealing party, such consent "ends all contention between the parties, and there is nothing to review on appeal."[1] In the instant case, the record reflects Appellants clearly consented to the specific language of the order denying injunctive relief. Under these circumstances, we hold Appellants may not now complain of the effect of that order denying Appellants the requested injunctive relief.

The order of the Trial Court is therefore AFFIRMED.

GARRETT, P.J., and ADAMS, J., concur.

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[1] *Napier v. Dilday*, 38 Okl. 365, 132 P. 1085 (1913). See also, *Ferrell v. State Department of Highways*, 387 P.2d 129 (Okl.1963) (party may not take inconsistent position on appeal or alleged error which party invited or acquiesced in at trial level); *Wray v. Ferris*, 184 Okl. 132, 85 P.2d 402 (1938) (A party who joins in a request for a particular order or judgment cannot appeal from such order).